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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

ROBERT O. SANDBERG,

Petitioner,

v.

THE CITY OF WHEATON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of Illinois refused to grant leave to appeal a decision of the Court of Appeals for the State of Illinois for the Second District affirming the taking of Petitioner's property as part of a redevelopment plan in the City of Wheaton, Illinois.

The question presented for review is:

Whether the exercise of eminent domain authority by a municipality to take property under a redevelopment plan is valid in the absence of the municipality making the specific findings required by the statute granting eminent domain authority to the municipality?

LIST OF PARTIES

The parties that participated in the appeal below are listed in the caption. In addition, Karen K. Sandberg, DuPage Trust Company, as Trustee under Trust Deed dated March 8, 1973, Jason R. Stiers, Jonathan T. Lee, d/b/a The Bubble Tea House, Cindy L. Nix, and unknown owners were named as defendants in the trial court.

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OPINION BELOW

This condemnation action was filed on August 20, 2002 in the Circuit Court of Illinois for the Eighteenth Judicial Circuit (DuPage County).

The trial court ultimately found for the City of Wheaton and against Mr. Sandberg and condemned his property. A final judgment was entered on October 2, 2006. (Appendices B and C).

Mr. Sandberg appealed to the Appellate Court for the State of Illinois for the Second District. The Appellate Court affirmed the judgment below on February 19, 2008. (Appendix A).

Mr. Sandberg then sought leave from the Supreme Court of Illinois to appeal. His Petition for Leave to Appeal was denied on May 29, 2008. (Appendix D).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

The Supreme Court of Illinois denied Petitioner's Petition for leave to Appeal on May 29, 2008. (Appendix D).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant Provisions of Tax Increment Allocation Redevelopment Act

65 ILCS 5/11-74.4-3 Definitions:

(b) "Conservation area" means any improved area within the boundaries of a redevelopment project area located within the territorial limits of the municipality in which 50% or more of the structures in the area have an age of 35 years or more. Such an area is not yet a blighted area but because of a combination of three or more of the following factors: dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; abandonment; excessive vacancies overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities; excessive land coverage; deleterious land use or layout; depreciation of physical maintenance; lack of community planning, is detrimental to the public safety, health, morals or welfare and such area may become a blighted area."

(p) "Redevelopment project area" means an area designated by the municipality, which is not less in the aggregate than 11/2 acres and in respect to which the municipality has made a finding that there exist conditions which cause the area to be classified as an industrial park

conservation area or a blighted area or a conservation area, or a combination of both blighted areas and conservation areas.

Relevant Provision Of
City Of Wheaton Ordinance No. F-0418
Approving A Tax Increment Redevelopment Plan

Section 1 B.

"There exist conditions which cause the Area to be subject to designation as a redevelopment project area under the Act and to be classified as a conservation area as defined in Section 11-74.4-3(b) of the Act."

STATEMENT OF THE CASE

Respondent City of Wheaton, an Illinois Home Rule Municipal Corporation, exercised eminent domain powers to take property belonging to Petitioner Robert O. Sandberg. On December 6, 1999, the City of Wheaton adopted by ordinance a Tax Increment Redevelopment Plan and Redevelopment Project for the City of Wheaton Main Street Redevelopment Project Area. The Ordinance was adopted pursuant to 65 ILCS 5/11-74.4-4 of the Illinois Compiled Statutes ("TIF Act"). The City asserted that the proposed Project was a "conservation area" as that term is defined in the TIF Act. The City also set forth the findings it claimed justified its actions. Included was a finding that "There exist conditions which cause the Area to be subject to designation as a redevelopment project area under the Act and to be classified as a conservation area as defined in Section 11-74.4-3(b) of the Act."

Attached to the Ordinance and incorporated therein was the Wheaton Main Street Redevelopment Area Project and Plan of November, 1999. The Plan concluded that the City could make a finding under the Act that "The Project Area on the whole has not been subject to appropriate growth and redevelopment through investment by private enterprise, and would not reasonably be anticipated to be developed consistent with City policies without adoption of this Redevelopment Plan." No finding that the area was detrimental to the public safety, health, morals or welfare was made by the City or in the Project and Plan.

On January 7, 2002, the City amended the Redevelopment Project and Plan. The Wheaton Main Street Redevelopment Area Project and Plan of November, 1999 as amended January 2, 2002 was attached to and incorporated in the Ordinance. The Amended Project and Plan concluded, as did the earlier version, that the City could make a finding under the Act that "The Project Area on the whole has not been subject to appropriate growth and redevelopment through investment by private enterprise, and would not reasonably be anticipated to be developed consistent with City policies without adoption of this Redevelopment Plan." As in the earlier version, no finding was made that the area was detrimental to the public safety, health, morals or welfare.

Defendant Robert Sandberg owned several parcels of property in the Main Street Redevelopment Area, including 111-113 North Main Street. On May 20, 2002, the City of Wheaton authorized the initiation of negotiation for the acquisition of 111-113 North Main Street. On May 21, 2002, the City of Wheaton sent an offer of purchase for

$260,000.00 to Mr. Sandberg, which required a response in ten days. On June 17, 2002, Mr. Sandberg spoke at a council meeting.

On August 19, 2002, the City of Wheaton approved the filing of the condemnation action against Mr. Sandberg. The condemnation action was filed the next day on August 20,, 2002 in the Circuit Court of Illinois for the Eighteenth Judicial Circuit (DuPage County).

During the lengthy trial proceedings, Mr. Sandberg continually challenged the use of eminent domain to take his property. Among other arguments, he asserted that the City had failed to make the necessary and appropriate specific findings required by the TIF Act which conferred the power to use eminent domain to take property for redevelopment and conservation areas. The trial court ultimately found for the City of Wheaton and against Mr. Sandberg and condemned his property. A final judgment in the amount of $350,000.00 was entered as the just compensation due Robert Sandberg on October 2, 2006. (Appendix A and Appendix B).

Mr. Sandberg appealed to the Appellate Court for the State of Illinois for the Second District. The Appellate Court affirmed the judgment below on February 19, 2008. The Appellate Court rejected Petitioner's claim that the failure to make specific findings required by the TIF Act invalidated Wheaton's Ordinance. Instead, the Appellate Court held that Wheaton's reference to the TIF Act in its general finding that the redevelopment plan met the requirements of the TIF Act was sufficient. (Appendix A at 8a-11a).

Mr. Sandberg then sought leave from the Supreme Court of Illinois to appeal. His Petition for Leave to Appeal was denied on May 29, 2008. (Appendix D).

REASONS FOR GRANTING THE PETITION

Whether the exercise of eminent domain authority by a municipality taking private property in the absence of the specific findings required by the statute granting the municipality the authority is valid is an important question, implicating the appropriate balance of the power of government to take property and the rights of property owners to enjoyment of their property. The decision of the Illinois Courts allowing the taking of Plaintiff's property based solely upon the City of Wheaton's conclusory finding of a conservation area disregards the safeguards long recognized by this Court in cases such as *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S. Ct. 360 (1930). Left undisturbed, the decision below will distort the carefully crafted balance between the rights of property owners and the eminent domain powers of state and local governments.

REVIEW IS WARRANTED BECAUSE THE ERRONEOUS RULING OF THE ILLINOIS COURTS AFFIRMING THE USE OF EMINENT DOMAIN IN THE ABSENCE OF THE FINDINGS REQUIRED BY THE STATUTE UNDER WHICH THE USE OF EMINENT DOMAIN WAS AUTHORIZED IMPLICATES SIGNIFICANT ISSUES OF PROPERTY RIGHTS PROTECTED BY THE FOURTEENTH AMENDMENT.

Illinois Courts have recognized that statutes empowering governmental authorities to take private property through eminent domain are in derogation of individual rights and must be strictly construed to protect the rights of the property owners. *Village of Cary v. Trout Valley Association*, 282 Ill. App. 3d 165, 667 N.E.2d 1082 (2nd Dist. 1996) and *Department of Transportation v. Hunziker*, 342 Ill. App. 3d 588, 796 N.E.2d 122 (3rd Dist. 2003). "A statutory grant of eminent domain power can only be exercised in the manner authorized by statute." *Village of Cary v. Trout Valley Association*, *supra* at 169.

These holdings are in conformity with the direction of this Court in *City of Cincinnati v. Vester*, *supra*. There, this Court affirmed the rejection of condemnations that were based on the general finding by a municipality that the takings in question furthered an unspecified public use. In rejecting this reliance on a mere conclusion without the specification of a particular public use, this Court stated "it would seem clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not

be conclusive." *Vester* at 447. The Court went on to note that

> [o]therwise, the taking of any land in excess condemnation, although wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such sweeping authority to municipalities as to make nugatory the express conditions upon which the authority is granted.

Vester at 447.

In this case, Wheaton's use of eminent domain is only valid if it was an authorized use of such power under the TIF Act. Illinois Courts have construed the purpose of that Act as providing municipalities with the means to eradicate blighted conditions. *People ex rel. City of Canton v. Crouch*, 79 Ill.2d 356, 403 N.E.2d 242 (1980). To be eligible to use eminent domain powers under the Act, a municipality must first establish that the proposed redevelopment area meets the statutory criteria for designation as a blighted area, conservation area or combination thereof. *Board of Education v. Burr Ridge*, 341 Ill.App. 3d 1004, 793 N.E.2d 856 (1st Dist. 2003). Wheaton asserted that the redevelopment area, which included Mr. Sandberg's property, was a conservation area as that term is defined under the TIF Act. However, the City made only the conclusory finding that "[t]here exist conditions which cause the Area to be subject to designation as a redevelopment project area under the Act and to be classified as a conservation area as defined in Section 11-74.4-3(b) of the Act."

However, the Act requires the municipality to make findings that there exist specific conditions which cause the redevelopment area to be classified as a conservation area. 65 ILCS 5/11-74.4-3(p). Under the statute in existence at the time of the adoption of the ordinance, a conservation area was defined as:

> . . . any improved area . . . in which 50% or more of the structures in the area have an age of 35 years or more. Such an area is not yet a blighted area but because of a combination of three or more of the following factors: dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; abandonment; excessive vacancies overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities; excessive land coverage; deleterious land use or layout; depreciation of physical maintenance; lack of community planning, is detrimental to the public safety, health, morals or welfare and such area may become a blighted area.

65 ILCS 5/11-74.4-3(b). Consequently, Wheaton had to make specific findings that 1) 50% of the buildings were more than 35 years old, 2) three or more of the listed factors existed making the area detrimental to the public safety, health, morals or welfare, and 3) because of the existence of these factors the area may become a blighted area.

In contradiction to *City of Cincinnati v. Vester*, *supra*, all of the findings required by the legislature of Illinois were not made by the City Wheaton. Indeed, given the limited findings of the Redevelopment Plan upon which the City based its eminent domain action, the required findings could not have been made. First, the City of Wheaton made no finding that any existing conditions made the area detrimental to the public safety, health, morals or welfare. The Project and Plan upon which the City relied also made no such finding of any condition that was already detrimental. To allow the City of Wheaton to adopt the ordinances absent a finding that the blighting factors had already made the area detrimental to the public safety, health, morals and welfare would ignore the clear language of the Act.

Second, the City of Wheaton had no basis on which to make its conclusory finding that the area may become blighted. The Eligibility Findings Report merely found that the characteristics contribute toward the decline of the project area. There is simply no finding that the existence of these characteristics would cause the area to become blighted.

The Illinois Appellate Court citing *City of Batavia v. Sandberg*, 286 Ill. App. 3d 991 (2d Dist. 1997) excused the failure to make specific findings because the reference to a "conservation area as defined in Section 11-74.4-3(b) of the Act" incorporates the specific requirements of the definition included in the statute. The Appellate Court reasoned that the conclusory reference to the Act was substantively the same as making the specific rulings. This reasoning and the resulting ruling should be rejected because it ignores

the fact that the Project and Plan, which were included in the Ordinance, did not support the specific findings required by the statute. Just as in *Vester*, the municipality is improperly acting to take property on a "bare recital". As a result, an individual's property rights have been terminated by the act of a municipality that fails to meet the requirements of the statute authorizing the use of eminent domain and is not supported by its own findings.

When non-compliance with a statute is apparent from the Ordinance and its attachments, a conclusory finding referencing the statute is not sufficient to allow the taking of property. The constitutional rights of individuals to hold property should and can not be trampled by the exercise of authority without the assurances guaranteed by a rule of law requiring strict compliance with the empowering statute. *City of Cincinnati v. Vester, supra.* In this case, the Illinois Appellate Court's ruling permitted the taking of Petitioner's property without assurance that the City of Wheaton followed the law. In these circumstances, the City of Wheaton's taking of Petitioner's property was invalid and in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reason, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — RULE 23 ORDER OF THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT FILED FEBRUARY 19, 2008

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

No. 2-06-1226

THE CITY OF WHEATON,

Plaintiff-Appellee,

v.

ROBERT O. SANDBERG,

Defendant-Appellant

(Karen K. Sandberg, Du Page Trust Company, Jason R. Stiers, Jonathan T. Lee, d/b/a The Bubble Tea House, Cindy L. Nix, and Unknown Owners, Defendants).

Appeal from the Circuit Court
of Du Page County.

No. 02-ED-65

Honorable
Kenneth L. Popejoy and
Stephen J. Culliton,
Judges, Presiding.

Appendix A

RULE 23 ORDER

The plaintiff, the City of Wheaton (the City), filed a condemnation petition against the defendants, Robert O. Sandberg, Karen K. Sandberg, Du Page Trust Company, Jason R. Stiers, Jonathan T. Lee, d/b/a The Bubble Tea House, Cindy L. Nix, and unknown owners. The Du Page Trust Company, Stiers, Lee, and unknown owners were defaulted. Nix filed a *pro se* appearance but thereafter did not participate in the proceedings, and she is not a party to this appeal. Karen Sandberg likewise is not a party to this appeal. Thus, our discussion will be limited to Robert Sandberg (the defendant). The defendant filed a traverse and motion to dismiss the condemnation petition. The motion was denied, and the City was granted the defendant's property. The defendant appeals, arguing that: (1) the City's ordinance authorizing the condemnation of his property is invalid because it did not comply with the Tax Increment Allocation Redevelopment Act (the Act) (65 ILCS 5/11-74.4-3 *et seq.* (West Supp. 1999)); (2) the ordinance is invalid because the subject area did not contain the blighting factors necessary to qualify it as a conservation area under the Act; (3) the taking did not serve a public purpose; and (4) the City did not make a good-faith offer to purchase the property before initiating the condemnation action. We affirm.

BACKGROUND

"The Real Property Tax Increment Allocation Redevelopment Act [65 ILCS 5/11-74.4-3 *et seq.*

(West Supp. 1999)] provides a mechanism for municipalities to finance redevelopment projects designed to eliminate or prevent urban blight." *Kassnel v. Village of Rosemont,* 135 Ill. App. 3d 361, 362-63 (1985); see also *Village of Wheeling v. Exchange National Bank of Chicago,* 213 Ill. App. 3d 325, 327 (1991). It permits a municipality to divert incremental tax revenues from other governmental entities located within a redevelopment project area and to use that money to subsidize improvements to the area. 65 ILCS 5/11-74.4-8(a) (West Supp. 1999); *Castel Properties, Ltd. v. City of Marion,* 259 Ill. App. 3d 432, 433-34 (1994); *Henry County Board v. Village of Orion,* 278 Ill. App. 3d 1058, 1060 (1996).

The procedure under the Act provides for public hearings and, subsequently, the passage of an ordinance designating a redevelopment project area and approving a redevelopment plan or project (65 ILCS 5/11-74.4-5 (West Supp. 1999)). *People ex rel. City of Canton v. Crouch,* 79 Ill. 2d 356, 360 (1980). Once a redevelopment plan or project is adopted, a municipality can use a number of powers granted to it under the Act to improve the area and implement the plan, including acquiring private property by eminent domain. 65 ILCS 5/1-74.4-4(c) (West Supp. 1999); *Canton,* 79 Ill. 2d at 360-61; *City of Chicago v. Boulevard Bank National Ass'n,* 293 Ill. App. 3d 767, 773 (1997).

To designate a redevelopment project area, a municipality must first establish that the area meets the statutory criteria for designation as a "blighted area,"

a "conservation area," a combination thereof, or an "industrial park conservation area." 65 ILCS 5/11-74.4-3(p) (West Supp. 1999). The redevelopment area here was designated a conservation area. A conservation area is defined as any improved area in which 50% or more of the structures in the area are over 35 years old. It is not yet a blighted area, but because of the presence of three or more specific factors, it is detrimental to the public safety, health, morals, or welfare and it may become a blighted area. 65 ILCS 5/11-74.4-3(b) (West Supp. 1999). These factors include: dilapidation; obsolescence; deterioration; presence of structures below minimum code standards; illegal use of individual structures; excessive vacancies; lack of ventilation, light, or sanitary facilities; inadequate utilities; excessive land coverage and overcrowding of structures and community facilities; deleterious land use or layout; and lack of community planning. 65 ILCS 5/11-74.4-3(b) (West Supp. 1999).

The City adopted such a redevelopment plan on December 6, 1999, declaring the Wheaton Main Street Redevelopment Project Area a conservation area as defined in section 11-74.4-3(b) of the Act (65 ILCS 5/11-74.4-3(b) (West Supp. 1999)). Wheaton Ordinance No. F-0418 § 1(B) (eff. December 6, 1999). The project area contained 133 parcels on 17 blocks in downtown Wheaton, consisting primarily of commercial property. The defendant is an owner of several commercial buildings in the project area, including 111-113 N. Main Street, the property at issue in this appeal.

Appendix A

The redevelopment plan set out the City's goals for the redevelopment area and contained the opinions of Teska and Associates (Teska). Teska conducted a field survey over the course of three days in August and September of 1998, and inspected every parcel in the project area, to determine the area's eligibility for designation as a conservation area. Teska determined that 77% of the buildings in the project area were more than 35 years old. Teska also found that the project area satisfied the statutory criteria for a conservation area due to the predominance and extent of the following blighting factors: age, deterioration of the buildings, depreciation of physical maintenance, obsolescence, presence of structures below minimum code standards, excessive vacancies, and excessive coverage, meaning the overcrowding of buildings on a single parcel or on a parcel of inadequate size.[1] Fifty percent of the parcels in the project area exhibited at least one of above blighting factors. Each of these factors was found to contribute toward the decline of the project area as a whole.

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1. Depreciation of physical maintenance was a factor to be considered under the Act in 1998, but for any redevelopment project area established by ordinance adopted on or after November 1, 1999, the definition of conservation area no longer included this factor. However, as the statute required that only three factors must be present for the area to be considered a conservation area, and as the City found the presence of five factors other than depreciation of physical maintenance, this statutory change is of no concern in this appeal.

The redevelopment plan had the stated purposes of "eradicating blighting conditions and instituting conservation measures," "removing and alleviating adverse conditions by encouraging private investment of underutilized and vacant properties which will strengthen the economy, tax base, business environment, and living environment," "improving existing public utilities within the area," and "enhancing the overall quality of the City of Wheaton."

On May 20, 2002, the City passed an ordinance authorizing the negotiation for the acquisition of the real property necessary to implement the plan. At that time, the City retained an appraiser who valued the defendant's property at $260,000. On May 21, 2002, the City sent the defendant a certified letter, informing him that the city council had authorized the acquisition of the property and offering to purchase it for $260,000. According to the transcripts from a city council meeting on June 17, 2002, the defendant addressed the mayor and the city council and stated that the City's offers to purchase his various properties were unacceptable.

On August 20, 2002, the City filed the condemnation action. The defendant filed a traverse and motion to dismiss the City's condemnation petition, alleging essentially as follows: the area was not blighted, no good-faith offer was made by the City to purchase the property, the City failed to demonstrate necessity or public use for the property, and the City's taking of the property would not benefit the health, safety, or welfare of the general public.

According to the plaintiff, a trial was held over the course of five days on the defendant's traverse and motion to dismiss. However, the defendant has failed to provide this court with transcripts of these hearings. Court orders show that on October 23, 2003, partial summary judgment was granted in favor of the City on the issues of sufficiency of legal description, good-faith negotiations, and the City's statutory authority to create a T1F District under its home rule authority. On February 7, 2005, the court directed a verdict in favor of the City on the issues of necessity and public purpose.

Lastly, the parties proceeded on the issue of just compensation. The City obtained updated appraisals of the defendant's property. One expert valued the defendant's property at $240,000, and the other expert valued it at $300,000. The defendant's expert valued the property at $350,000. "In the spirit of judicial economy and to end [the] litigation," the City conceded the value as set forth by the defendant's expert and moved for summary judgment on that issue. The court granted summary judgment on the issue of valuation, finding $350,000 to be just compensation for the defendant's property. In turn, the court granted the City the property.

ANALYSIS

The defendant appeals the denial of his traverse and motion to dismiss. "A traverse and motion to dismiss challenge the plaintiff's right to condemn the defendant's property and will result in dismissal when

the plaintiff cannot show its right to condemn by proper proof." *Village of Cary v. Trout Valley Ass'n*, 282 Ill. App. 3d 165, 169 (1996). Where a defendant files a traverse and motion to dismiss, the burden is on the plaintiff to make a *prima facie* case of the disputed allegations. *Trout Valley Ass'n*, 282 Ill. App. 3d at 169. When a valid ordinance for a taking of property is introduced into evidence, it establishes a *prima facie* case authorizing the acquisition of the property by eminent domain. *Exchange National Bank*, 213 Ill. App. 3d at 331. The burden then shifts to the defendant to show that the plaintiff abused its discretion or lacked the authority to condemn the site. *Exchange National Bank*, 213 Ill. App. 3d at 331. Here, the City ordinance was introduced, establishing a *prima facie* case authorizing the taking. The burden then shifted to the defendant to prove his allegations, namely that the ordinance was invalid, the taking served no public purpose, and the City failed to engage in good-faith negotiations prior to instituting suit. For the reasons that follow, we find that the defendant failed to sustain his burden of proof.

First, the defendant argues that the trial court erred in denying his traverse and motion to dismiss because the City's ordinance is invalid for failing to strictly comply with the Act authorizing the creation of a redevelopment area (65 ILCS 5/11-74.4-3 *et seq.* (West Supp. 1999)). Although the City responds that this issue was "not directly raised in the trial court," the record suggests otherwise. The defendant's memorandum in support of his traverse appears to have raised this issue. Thus, we do not find the issue waived.

The defendant's argument turns on the proper interpretation of the requirements of the Act, a question of law which we review *de novo*. *City of Oakbrook Terrace v. Suburban Bank & Trust* Co., 364 Ill. App. 3d 506, 510 (2006); *Nikolic v. Seidenberg*, 242 Ill. App. 3d 96, 99 (1993). The judgment may be affirmed on any grounds supported by the record, regardless of whether the trial court relied on those grounds or whether its reasoning was correct. *Nikolic*, 242 Ill. App. 3d at 99.

"A municipality can only exercise the power of eminent domain when it has been specifically conferred by legislative enactment," and only in the manner authorized by the enactment. *Trout Valley*, 282 Ill. App. 3d at 169. A statute or ordinance conferring the eminent domain power must be strictly construed in order to protect the rights of property owners. *Trout Valley*, 282 Ill. App. 3d at 169.

In enacting the ordinance at issue in this condemnation action, the City relied, in part, on section 11-74.4-3(p) of the Act (65 ILCS 5/11-74.4-3(p) (West Supp. 1999)), which prescribes the procedures for establishing such an area and defines a "redevelopment project area" as:

> "[A]n area designated by the municipality * * * in respect to which the municipality has made a finding that there exist conditions which cause the area to be classified as an industrial park conservation area or a blighted area or a conservation area, or a

> combination of both blighted areas and conservation areas." 65 ILCS 5/11-74.4-3(p) (West Supp. 1999).

A "conservation area," in turn, is defined as:

> "[A]ny improved area within the boundaries of a redevelopment project area located within the territorial limits of the municipality in which 50% or more of the structures in the area have an age of 35 years or more. Such an area is not yet a blighted area but because of a combination of 3 or more of the following factors is detrimental to the public safety, health, morals or welfare and such an area may become a blighted area * * *" 65 ILCS 5/11-74.4-3(b) (West Supp. 1999).

Here, in ordinance No. F-0418, the City made the following finding:

> "There exist conditions which cause the Area to be subject to designation as a redevelopment project area under the Act and to be classified as a conservation area as defined in Section 11-74.4-3(b) of the Act." Wheaton Ordinance No. F-0418 § 1(B) (eff. December 6, 1999).

The defendant argues that the ordinance and the redevelopment plan failed to establish the remaining

requirements of a conservation area, specifically that the area "is detrimental to the public safety, health, morals or welfare" and that the factors would "cause the area to become blighted." See 65 ILCS 5/11-74.4-3(b) (West 1994). This precise issue was addressed and rejected by this court in *City of Batavia v. Sandberg*, 286 Ill. App. 3d 991 (1997). We found that when the city used the words "a 'Conservation Area' as defined in Section 11-74.4-3(b) of the Act" in its ordinance, it adopted and included the entire definition being referred to, *i.e.*, the definition of a conservation area. *Sandberg*, 286 Ill. App. 3d at 997-98. The Act does not require that the entire definition of conservation area be included verbatim in the city's findings. *Sandberg*, 286 Ill. App. 3d at 998. Whether the city uses the phrase "a 'Conservation Area' as defined in Section 11-74.4-3(b) of the Act" or includes verbatim the entire definition of a conservation area, the substance of the findings is the same either way. *Sandberg*, 286 Ill. App. 3d at 998. Thus, here, the City complied with the provisions of the Act in establishing a redevelopment project area, and it was not error for the trial court to deny the defendant's traverse and motion to dismiss on this ground.

Next, the defendant attacks the validity of the ordinance's underlying findings, i.e., that the proposed redevelopment area qualified as a conservation area. Municipal ordinances are presumed valid, and the party challenging the ordinance bears the burden of proving its invalidity. *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 406 (2006); *Greater Peoria Sanitary*

& Sewage Disposal District v. Hermann, 153 Ill. App. 3d 398, 401 (1987). The defendant acknowledges that municipal ordinances are presumed valid, but argues that he presented sufficient evidence to overcome the presumption.

To overturn an ordinance, the defendant must prove by clear and convincing evidence an abuse of discretion by the municipality. *Board of Education of Community High School District No. 218 v. Village of Robbins*, 327 Ill. App. 3d 599, 606 (2001). "Clear and convincing evidence is that 'quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition [stated].' " *Henry County Board*, 278 Ill. App. 3d at 1062, quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 213 (1995). Furthermore, a reviewing court defers to the trial court's findings of fact and so decides only whether a finding is against the manifest weight of the evidence. *Henry County Board*, 278 Ill. App. 3d at 1062; see also *Southwestern Illinois Development Authority v. Al-Muhajirum*, 318 Ill. App. 3d 1005, 1007 (2001) (a trial court's finding that property was blighted will not be disturbed unless it was contrary to the manifest weight of the evidence). A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the determination is unreasonable, arbitrary, or without basis in the evidence presented. *Best v. Best*, 358 Ill. App. 3d 1046, 1053 (2005). If the record contains any evidence to support the trial court's judgment, the judgment should be affirmed. *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill. 2d 471, 488 (2004).

Appendix A

The record shows that the City introduced into evidence the ordinance and the redevelopment plan. The redevelopment plan contained specific and detailed findings establishing the declining character of the proposed redevelopment area. Based upon these findings, a presumption existed that the ordinance finding that the area qualified as a conservation area was valid. See *Board of Education, Pleasantdale School District No. 107 v. Village of Burr Ridge*, 341 Ill. App. 3d 1004, 1012 (2003).

Citing *Reed-Custer Community Unit School District No. 255-U v. City of Wilmington*, 253 Ill. App. 3d 503 (1993), the defendant argues that once he introduced evidence that development in the area could be reasonably anticipated, he successfully rebutted the presumption, and the presumption vanished. It is true that " '[o]nce a party introduces sufficient evidence to rebut a presumption, * * * the presumption disappears.' " *Robbins*, 327 Ill. App. 3d at 606, quoting *Reed-Custer*, 253 Ill. App. 3d at 508. But the disappearance of a presumption does not affect the ultimate burden of proof. See *Franciscan Sisters Health Care Corp. v. Dean*, 102 Ill. App. 3d 61, 68 (1981) (once a presumption takes effect, the opposing party has the burden of producing evidence to rebut it; once evidence opposing the presumption comes in, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed). Thus, even if the defendant rebutted the presumption, it remained his burden to submit clear and convincing evidence of the

invalidity of the ordinance. See *Robbins*, 327 Ill. App. 3d at 606. The trial court could properly determine that the defendant had not met his burden. See *Robbins*, 327 Ill. App. 3d at 606; *cf. Reed-Custer*, 253 Ill. App. 3d at 508 (plaintiffs presented clear and convincing evidence that overcame the presumed validity of the City's factual findings and sustained their burden of proof).

The defendant argues that the trial court's finding of validity was against the manifest weight of the evidence, but the defendant's failure to provide this court with a complete record precludes meaningful review of this issue. As the appellant, the defendant has an obligation to provide the reviewing court with a sufficiently complete record of the proceedings so that the court may resolve all pending issues. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Here, the record on appeal does not contain the transcripts of the hearing on the defendant's traverse and motion to dismiss. In the absence of a complete record, we must presume that the trial court's judgment was in conformity with the law and supported by the facts presented to the trial court. *Foutch*, 99 Ill. 2d at 392; see *In re W.L.W.*, 299 Ill. App. 3d 881, 884 (1998) (where the record on appeal is incomplete, the reviewing court will indulge in every reasonable presumption favorable to the judgment or order being appealed).

Review of the common-law record fails to establish that the defendant met his burden of proof to show the invalidity of the ordinance. First, the defendant relies on evidence that he received an "offer [to purchase the]

property from a private source." The defendant's suggestion that his particular property was of value, and thus not blighted, is no defense to the condemnation action. *City of Chicago v. Barnes*, 30 Ill. 2d 255, 257 (1964) (the fact that there may be some sound buildings in the blighted area is no defense to the proceedings); *Exchange National Bank*, 213 Ill. App. 3d at 332. Property may be taken even though, standing by itself, it is unoffending, for the test is based on the condition of the area as a whole. *Barnes*, 30 Ill. 2d at 257; *Exchange National Bank*, 213 Ill. App. 3d at 332.

The defendant also relies on the statement of Councilman Gresk, made during a city council meeting, that 10 or 12 new businesses had opened in Wheaton in 2001. However, a review of these comments as a whole shows that they were neither testimony nor an official finding regarding the particular conditions in this redevelopment project area. Rather, Councilman Gresk was simply disputing the defendant's allegations that the City does not encourage or assist new businesses. Lastly, the defendant relies on the affidavits of his expert witnesses who challenged the findings of the City's experts. The weight to be assigned an expert opinion depends on the factual basis for that opinion. See *In re Winters*, 255 Ill. App. 3d 605, 609 (1994) (an expert's opinion is only as valid as the reasons for it). Here, the affidavits merely make brief, conclusory statements that the City's expert findings were incorrect and unsupported by any evidence. Moreover, they presented an issue of credibility that was within the trial court's province to resolve. *People v. Ferguson*, 181 Ill. App. 3d

950, 953 (1989) ("Where the evidence is conflicting, it is the province of the trier of fact to resolve the conflict and determine which witnesses are to be believed"). As the trier of fact, the judge could accept one expert opinion over another, and we find no basis in the record to overturn the court's findings. *City of Marseilles v. Radke*, 307 Ill. App. 3d 972, 977 (1999); *see, e.g., Alsip Park District v. D & M Partnership*, 252 Ill. App. 3d 277, 286 (1993) (the court credited the opinions offered by plaintiff's experts over the opinions of the defendant's experts, finding that the opinions of plaintiff's experts were more comprehensive than those offered by defendant's experts). For these reasons, we conclude that the court's finding that the defendant failed to establish by clear and convincing evidence the invalidity of the ordinance was not against the manifest weight of the evidence.

The defendant's next argument on appeal is that the taking of his property did not serve a public purpose, and that the real reason for the taking was "to push [the defendant] out of the City of Wheaton." Before the right of eminent domain may be exercised, the law requires that the use for which land is taken shall be public, not private. *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill. 2d 225, 236 (2002); *Poole v. City of Kankakee*, 406 Ill. 521, 526 (1950). Under the constitution, property cannot be condemned for a private purpose. U.S. Const. amend. V; Ill. Const. 1970, art. I, §15.

It is well established that the purpose of eliminating a blighted area is a valid public purpose. *National City Environmental,* 199 Ill. 2d at 238; *City of Urbana v. Paley,* 68 Ill. 2d 62, 73 (1977); *City of Chicago v. Walker,* 50 Ill. 2d 69, 71 (1971); *Al-Muhajirum,* 318 Ill. App. 3d at 1009-1010; *City of Chicago v. Gorham,* 80 Ill. App. 3d 496, 499 (1980). "This is no less true when the purpose of the municipality is the prevention, rather than elimination, of blight which has not yet begun or which, though begun, has not yet reached its apex." *Paley,* 68 Ill. 2d at 73. Stimulation of commercial growth and removal of economic stagnation are objectives that serve an important public purpose. *Paley,* 68 Ill. 2d at 75; see *National City Environmental,* 199 Ill. 2d at 239.

The record establishes the stated purposes of the taking as: "eradicating blighting conditions and instituting conservation measures," "removing and alleviating adverse conditions by encouraging private investment of underutilized and vacant properties which will strengthen the economy, tax base, business environment, and living environment," "improving existing public utilities within the area," and "enhancing the overall quality of the City of Wheaton." The City's promotion of the commercial rebirth of its downtown area is a public purpose satisfying the requirements of the constitution. See *Paley,* 68 Ill. 2d at 74. The burden then shifted to the defendant to show that the condemnation served no public purpose. See *Alsip,* 252 Ill. App. 3d at 285. As before, the defendant has not adequately supported his argument by furnishing a complete record to this court. See *Foutch,* 99 Ill. 2d at

391-92. We cannot find that the defendant sustained his burden of proof on this issue without a complete record of the evidence presented to the trial court.

Nor does the record as it stands support the defendant's argument. The trial court directed a finding in the City's favor on this issue. When ruling on a motion for a directed finding, the trial court must employ a two-step analysis. *In re Estate of Phelan*, 375 Ill. App. 3d 875, 881 (2007). First, the court must determine, as a matter of law, whether the nonmovant has established each element of a *prima facie* case. See *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003); *Phelan*, 375 Ill. App. 3d at 881. If the trial court finds that the nonmovant has not established a *prima facie* case, it should direct a finding in favor of the movant. See *Cryns*, 203 Ill. 2d at 275. If, however, the trial court finds that nonmovant has established a *prima facie* case, it proceeds to the second step of the analysis, which is to weigh the evidence, assess the credibility of the witnesses, and generally consider the weight and quality of all the evidence. See *Cryns*, 203 Ill. 2d at 275-76; *Phelan*, 375 Ill. App. 3d at 881. In its role as fact finder, the court must consider the totality of the evidence presented, including any evidence that is favorable to the movant, to determine whether the *prima facie* case survives. See *Cryns*, 203 Ill. 2d at 275-76; *In re Estate of Goldstein*, 293 Ill. App. 3d 700, 709 (1997). If the trial court finds that the nonmovant has failed to present a *prima facie* case as a matter of law, our review is *de novo*. See *Goldstein*, 293 Ill. App. 3d at 709. If the trial court moves on to consider the weight and quality

of the evidence, finding that no *prima facie* case remains, we review the court's determination under the "manifest weight of the evidence" standard. *Goldstein*, 293 Ill. App. 3d at 709.

It is not clear whether the trial court determined that the defendant failed to establish a *prima facie* case, or whether the trial court engaged in the second step of the analysis and considered the weight and quality of all the evidence. However, the defendant contends on appeal that the trial court's judgment in this regard was against the manifest weight of the evidence, and so it appears that the trial court proceeded to the second step of the analysis. The City concurs that this is the appropriate standard of review.

By definition, a "*prima facie* case" entails "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary 1228 (8th ed. 2004). Here, the defendant apparently presented little evidence, other than unfounded expert opinion testimony, that the City's taking failed to satisfy a public purpose. Where there is no factual support for an expert's conclusions, the trial court may correctly give no weight to the expert's opinions. See *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 875-76 (1991). Moreover, contrary to the defendant's argument, evidence that the City was pursuing a rule to show cause against the defendant for his continued failure to comply with the City's building code does not show a private purpose for the City's taking. Therefore, because the defendant's evidence

was insufficient to sustain his burden of proof, the trial court did not err in directing a finding in the City's favor.

Lastly, the defendant argues that the trial court erred in finding that the City made a reasonable attempt to agree with the defendant on compensation for his property prior to filing suit. The Illinois Eminent Domain Act provides that private property will not be taken for public use without the payment of just compensation. 735 ILCS 5/7-101 (West Supp. 1999); *Lake County Forest Preserve District v. First National Bank of Waukegan*, 200 Ill. App. 3d 354, 356 (1990). A condition precedent to the exercise of eminent domain power is an attempt to reach an agreement with the property owner on the amount of compensation. *Lake County Forest Preserve*, 200 Ill. App. 3d at 356. "In this regard, the acquiring authority must make a *bona fide* attempt to agree, and the attempt must be made in good faith." *Lake County Forest Preserve*, 200 Ill. App. 3d at 356. Where a wide disparity exists between the offer of the acquiring authority and the demand of the property owner, and where the circumstances show that no practical solution can be reached, no further negotiations are necessary. *Lake County Forest Preserve*, 200 Ill. App. 3d at 356.

Generally, whether a party has acted in good faith is a question of fact (*151 Interstate Road Corp.*, 209 Ill. 2d at 488), but when the facts are undisputed and reasonable minds cannot disagree, the issue may be determined as a matter of law. See *Lindquist v. Chicago & Northwestern Transportation Co.*, 309 Ill. App. 3d 275, 283 (1999); see also *Saunders v. Klungboonkrong*, 150

Ill. App. 3d 56, 61 (1986) (where it is apparent from the undisputed facts that only one conclusion can be drawn, the question becomes one for the court).

Here, the trial court resolved this issue as a matter of law, by way of summary judgment. In the City's motion for summary judgment, the City argued that it had made a written offer to the defendant in the full amount of the appraised value and that the defendant, in turn, refused to sell to the City. The motion was supported by the affidavits of the City's appraisal experts and the affidavit of Donald Rose, the city manager. The affidavits established the following uncontested facts. The City retained two experts to determine the fair market value of the defendant's property. The appraisers valued the property at $260,000. The City then offered to purchase the defendant's property for $260,000. Furthermore, "[f]or weeks, the City * * * conducted negotiations with [the defendant], * * * including multiple presentations by [the defendant] at City council meetings." Despite these negotiations, the City was unable to reach an agreement with the defendant. Lastly, during the negotiations, the defendant failed to present an appraisal differing from the City's appraisals.

In response, the defendant filed a motion to dismiss the City's motion for summary judgment. In the motion, the defendant asserted that "offering [Karen Sandberg] one-half of their appraised value does not demonstrate good faith." The defendant further stated: "[a]s for amiable negotiations there is simply no room for

negotiating when it comes to one's life and livelihood. Defendant is not interested in holding out for a better price, for there is no price. Defendants don't want to sell." Thereafter, the City again moved for summary judgment, based on these admissions. The trial court granted the City's motion.

Summary judgment should be granted when the pleadings, depositions, and affidavits on file clearly show that no issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2004); *Perfection Corp. v. Lochinvar Corp.*, 349 Ill. App. 3d 738, 744 (2004); *Largosa v. Ford Motor Co.*, 303 Ill. App. 3d 751, 753 (1999). In deciding whether a material fact exists, the court must consider all the evidence before it strictly against the movant and liberally in favor of the opponent. *Largosa*, 303 Ill. App. 3d at 753. "The purpose of summary judgment is not to try a question of fact but to determine if one exists." *Perfection Corp.*, 349 Ill. App. 3d at 744. Although a nonmoving party is not required to prove his case at the summary judgment stage, to survive a motion for summary judgment the nonmoving party must present a factual basis that would arguably entitle the party to a judgment. *Perfection Corp.*, 349 Ill. App. 3d at 744. Our review of the grant of summary judgment is *de novo*. *Largosa*, 303 Ill. App. 3d at 753.

Construing the pleadings, affidavits, and admissions on file strictly against the City and liberally in favor of the defendant, we find that the trial court properly

granted the City's motion for summary judgment. The material facts put forth in the City's affidavits were uncontested by counteraffidavit and, thus, are to be taken as true. *Safeway Insurance Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1999) ("When affidavits presented in support of summary judgment are not contradicted by counteraffidavits, they must be taken as true, even though the adverse party's pleadings allege contrary facts"). Although the defendant's motion to dismiss averred that the City offered Karen Sandberg one-half the property's appraised value, the defendant failed to support this assertion by affidavit or other evidence. The opposing party may not rely on his pleadings alone to raise issues of material fact. *Safeway*, 304 Ill. App. 3d at 691. Thus, the affidavits on file clearly demonstrated that the City offered the defendant the fair market value of the property, as determined by its expert appraisers. Significantly, the defendant does not argue that the City's offer was grossly inadequate. As the City offered the defendant the fair market value of the property, this constituted good-faith negotiations. See *City of Naperville v. Old Second National Bank of Aurora*, 327 Ill. App. 3d 734, 741(2002) (a condemning authority has satisfied its statutory obligation to make a *bona fide* attempt to agree where the authority offers to purchase the property for its appraised value).

Furthermore, despite continued efforts to negotiate with the defendant, the parties were unable to reach an agreement. "Under such circumstances it is clear that no practical solution could have been reached by further negotiations, and, therefore, none were needed."

Waukegan Port District v. Booras, 55 Ill. App. 3d 790, 793-94 (1977); see also *City of Oakbrook Terrace v. La Salle National Bank*, 186 Ill. App. 3d 343, 351 (1989) (where further negotiations would be futile, none are necessary). Thus, there was no genuine issue of material fact concerning good-faith negotiations, and the trial court did not err in granting summary judgment on this issue.

CONCLUSION

For these reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.

GILLERAN JOHNSON, J., with BYRNE, P.J., and O'MALLEY, J., concurring.

APPENDIX B — FINAL JUDGMENT ORDER OF THE CIRCUIT COURT OF EIGHTEENTH JUDICIAL CIRCUIT, DU PAGE COUNTY, ILLINOIS FILED OCTOBER 2, 2006

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

No. 2002 ED 65

CITY OF WHEATON,

Plaintiff,

v.

ROBERT SANDBERG,

Defendant.

FINAL JUDGMENT ORDER

THIS CAUSE, coming to be heard on the Complaint on the CITY OF WHEATON, and Illinois Home Rule Municipal Corporation (hereinafter "Plaintiff"), to ascertain the just compensation for the taking of property sought for public purposes as set forth in the Complaint for Condemnation filed in this matter ("the Property"); and

The Plaintiff, appearing by and through its attorneys, DAY & ROBERT, P.C., and Defendants, ROBERT SANDBERG and KAREN SANDBERG,

appearing through their attorney, MARK T. SCHMIDT of SCHMIDT & BARBROW, P.C.; and

It appearing to the Court that the Defendants to this proceeding have been served with process as provided for and required by Statute, and have either entered their appearance, or have been defaulted; and

Plaintiff having filed a Motion For Summary Judgment on September 13, 2006, and this Honorable Court granting the Plaintiff's Summary Judgment Motion that Judgment ought to be entered against the CITY OF WHEATON and in favor of Defendants ROBERT SANDBERG and KAREN SANDBERG in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), in exchange for which the Plaintiff would be entitled to the Property identified in its Complaint and described in Group Exhibit A, attached hereto and made a part hereof; and

The Court otherwise being fully advised in all the premises:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. That total of Just Compensation to be paid by Plaintiff to Defendants, ROBERT SANDBERG and KAREN SANDBERG, for the Property at issue in this case and described in Group Exhibit A is the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), and Judgment is entered against the Plaintiff and in

favor of the Defendants, ROBERT SANDBERG and KAREN SANDBERG.

2. The Plaintiff shall pay and deposit said Three Hundred Fifty Thousand Dollars ($350,000.00) on or before the 35th day following the date of the entry of this Final Judgment Order, with said deposit to be made with the Treasurer of the County of DuPage.

3. Upon deposit of said Just Compensation of funds in the amount referenced above with the Treasurer of the County of DuPage, the Plaintiff may apply for an Order vesting title to the Property, in fee simple, in it.

ENTERED:

s/ Stephen Culliton
JUDGE

_____

DATE

APPENDIX C — ORDER OF THE CIRCUIT COURT OF EIGHTEENTH JUDICIAL CIRCUIT, DU PAGE COUNTY, STATE OF ILLINOIS FILED FEBRUARY 7, 2005

UNITED STATES OF AMERICA

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, COUNTY OF DU PAGE, STATE OF ILLINOIS

CASE NUMBER
2002 ED 65
111-113 MAIN

CITY OF WHEATON

-vs-

SANDBERG, et al.

ORDER

This matter coming on to be heard, the Court being fully advised in the premises and having jurisdiction of the subject matter, IT IS ORDERED HEREBY: The court having previously issued summary judgment on all issues other than necessity and public purpose, this court having issued a directed verdict in favor of the plaintiff on necessity and public purpose traverse issues, the plaintiff having satisfied all jurisdictional prerequisites of the complaint, it is hereby ordered, case continued to 3/7/05 @ 9[30] AM for 218 case management

in court #2020 and hearing on defendants motion for interlocutory appeal. Defendant shall file its motion for interlocutory appeal by 2/28/05.

ENTER: s/ Stephen Culliton
JUDGE

DATE: February 7, 2005

APPENDIX D — ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL DATED MAY 29, 2008

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

May 29, 2008

Mr. Anthony S. DiVincenzo
DiVincenzo Schoenfield Swartzman
33 North LaSalle Street, 29th Floor
Chicago, IL 60602

No. 106246 – City of Wheaton, respondent, v. Robert O. Sandberg, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on July 3, 2008.